Supreme Court, U.S.
FILED

No. (1)

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In The

Supreme Court of the United States

October Term, 1997

LAURA CULLEN,

Petitioner,

vs.

BETTY GIBSON, Individually and in her official capacity as Vice-president of Student Affairs of Kentucky State University; MARY SMITH, Individually and in her official capacity as President of Kentucky State University; WILLIAM PARKER, Dr.; GEORGE H. HELTON; ROBERT E. ISON; VALINDA E. LIVINGSTON; VELERIA SHAVERS; RICHARD TAYLOR, Dr.; MICHELE C. COLEMAN; M. ANTHONY HOWARD; JOYCE ANN JOHNSON; ANTHONY T. REMSON, Dr.; CURTIS D. SULLIVAN, all Individually and in their official capacities as Regents of Kentucky State University,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether the speech of the Student Publications Coordinator of a public university in defense of and on the subject of the First Amendment rights relevant to student publications is a matter of public concern and therefore within the protection of the First Amendment, and accordingly whether actions taken against the Student Publications Coordinator in retaliation for such speech is actionable under 42 U.S.C. Section 1983.

PARTIES TO THE PROCEEDING

A list of all parties to this proceeding is contained in the caption to this case. In the action in the United States Court of Appeals for the Sixth Circuit, there were two additional Plaintiffs-Appellants, namely, Charles Kincaid and Capri Coffer (student writers/editors). However, they are not necessary parties in this proceeding. There are no parent companies or non-wholly owned subsidiaries of the Petitioner.

TABLE OF CONTENTS

Page

Questions presented for review i

Parties to the proceeding ii

Table of contents iii

Table of citations iv

Opinions below 1

Statement of jurisdiction 1

Constitutional and statutory provisions involved ... 2

Statement of the case 3

Basis for federal jurisdiction 5

Reasons for allowance of the Writ 7

Conclusion 10

TABLE OF AUTHORITIES

Page

CASES CITED

Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) 8, 9

Givhan v. Western Line Consolidated School District, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979) 8

Marohnic v. Walker, 800 F.2d 613 (6th Cir. 1986) 8

Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) 8

Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) 7

Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) 8

Swineford v. Snyder County, 15 F.3d 1258 (3rd Cir. 1994) 8

Tinker v. Des Moines Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 733 (1969) 9

STATUTES CITED

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 1331 5

28 U.S.C. Section 1343(a)(3) 5

28 U.S.C. Section 1343(a)(4) 5

42 U.S.C. Section 1983 ..... 2, 6

CONSTITUTIONAL PROVISIONS CITED

First Amendment to the United States Constitution 2, 6, 7, 8, 9, 10

Fourteenth Amendment to the United States Constitution 2, 6

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Laura Cullen, respectfully requests that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, filed September 4, 1997, has not been recommended for full-text publication, and is reproduced hereto as Appendix A. The Order of the United States Court of Appeals for the Sixth Circuit denying the Petition for Rehearing, filed October 8, 1997 is reproduced herein as Appendix B. The Opinions of the United States District Court for the Eastern District of Kentucky, filed on April 4, 1996 and May 7, 1996, relevant to the issue of this Petition are not reported, and are reproduced herein as Appendix C. A copy of the Order of the United States District Court, Eastern District of Kentucky, making all prior Orders of the Court dismissing the relevant claim of the Plaintiff final and appealable is reproduced herein as Appendix D.

STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 4, 1997, as set forth in Appendix A. The Petition for Rehearing by the United States Court of Appeals for the Sixth Circuit

was denied by Order entered on October 8, 1997, as indicated in Appendix B.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The First Amendment to the United States Constitution provides in relevant part as follows: "Congress shall make no law . . . abridging the freedom of speech or of the press . . . ".

The Fourteenth Amendment to the United States Constitution provides in relevant part " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ".

42 U.S.C. Section 1983 provides in relevant part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ".

STATEMENT OF THE CASE

The Petitioner, Laura Cullen, was the Coordinator of Student Publications at Kentucky State University, a state-supported public institution of higher education. Ms. Cullen's job duties included overseeing the student newspaper and serving as advisor to the campus yearbook. See job description for the Coordinator of Student Publications, included herewith as Appendix E.

The Respondent Betty Gibson was, at all relevant times, the Vice-president of Kentucky State University for Student Affairs; the Respondent, Mary Smith, was at all relevant times the President of Kentucky State University. The remaining Respondents herein are members of the Board of Regents of the Kentucky State University, the governing body of Kentucky State University pursuant to state law. All Respondents were named in the initial action in botl their official and individual capacities.

In November of 1994, the Respondent Gibson directed Ms. Cullen, as Coordinator of Student Publications, not to publish a particular letter to the editor of the school newspaper. Ms. Gibson further suggested to Ms. Cullen that "more positive news" should be published in the paper. Ms. Cullen refused to dictate the contents of the newspaper, opining that such directions were inconsistent with the First Amendment rights applicable to the student publication. On the following day, Ms. Gibson transferred Ms. Cullen from her position as Coordinator of Student Publications to an unspecified position in the housing office. The transfer was done without either notice or a hearing, and was not done in accordance with Kentucky State University policies and procedures. On

the same day that the Petitioner Cullen was transferred, the Respondent Gibson and Respondent Smith further determined to confiscate the student yearbook which had been received that day from the publisher. To date, the yearbooks have not been distributed to the students of Kentucky State University. Neither the Petitioner Cullen nor the Student Publications Board was consulted in the decision to confiscate the yearbooks.

Under Kentucky State University policy, both the newspaper and the yearbook are under the general supervision of the Student Publications Board. The Student Publications policy is reproduced herein as Appendix F. Kentucky State University policy further provides that both publications "shall be as free of censorship as prevailing law dictates." As advisor to the publications, the Petitioner Cullen was limited in her ability to control the content of those publications. The Student Publications policy provides in relevant part that " . . . an advisor may require changes in the form of materials submitted by students, but such changes must deal only with the form or the time and manner of expressions rather than alteration of its content."

Respondent Gibson next directed another Kentucky State University employee to change the lock on Petitioner Cullen's office. The Respondent Gibson discussed replacing Petitioner Cullen as Coordinator of Student Publications. Respondent Gibson told another Kentucky State University employee, the Petitioner's direct supervisor, that the Petitioner was "on probation, she cannot receive a raise." The Respondent Gibson asserted concerns with the quality of the publications after-the-fact, questioning such things as the color of the yearbook

cover and inclusion of photos of President Clinton and Ross Perot.

The Petitioner Cullen discussed her concerns with what she perceived as violations of the First Amendment rights applicable to these student publications in the media. The Respondent Smith criticized the Petitioner Cullen for her public expressions of her views on the First Amendment. The Petitioner Cullen directly addressed the First Amendment issues with Kentucky State University's attorney, and provided counsel for Kentucky State University the telephone number of the Student Press Law Center to verify her stance regarding the First Amendment as it concerned the student publications.

The Petitioner Cullen was not returned to her position as Coordinator of Student Publications until after filing a grievance. Even then, however, the Respondent Gibson still attempted to control the content of the student publications. See Memorandum to the Petitioner from the Respondent Gibson, reproduced herein as Appendix G. The Respondent Gibson again dictated "more positive news is to be published," and that the newspaper "must be reviewed by *The Student Publications Board* before going to print."

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The initial action was brought in the United States District Court for the Eastern District of Kentucky pursuant to 28 U.S.C. Sections 1331 and 1343(a)(3) and (4), as

the claims of the Petitioner were brought pursuant to 42 U.S.C. Section 1983 for violation of the First and Fourteenth Amendments to the Constitution of the United States. On April 4, 1996, the United States District Court granted partial summary judgment, but it was not clear therein as to the Court's position on Ms. Cullen's claim that she was retaliated against for the exercise of her own rights under the First Amendment. Accordingly, the Petitioner brought a Motion to Alter or Amend the partial summary judgment. By Order entered May 7, 1996, the District Court dismissed the Petitioner's claims on the grounds that the Petitioner's "concern over the students' publications is not a matter of public concern but rather relates to matters of internal quality, and, therefore, to the extent Cullen advances such claim it must be dismissed." Thereafter, the Petitioner moved to voluntarily dismiss the remainder of her claims, and requested the Court to make all prior Orders of Dismissal of the Court final and appealable. This was done by Order entered on the 19th day of July, 1996. The Notice of Appeal to the United States Court of Appeals for the Sixth Circuit was filed on August 9, 1996. The United States Court of Appeals for the Sixth Circuit affirmed the District Court's dismissal of the Petitioner's claims on the grounds that the case was moot (Petitioner Cullen had since left the employment of the Kentucky State University) and the Sixth Circuit accordingly did not have jurisdiction. This Order was entered on September 4, 1997. The Petition for Rehearing was denied by Order entered on October 8, 1997.

REASONS FOR ALLOWANCE OF THE WRIT

The United States Court of Appeals for the Sixth Circuit left unanswered the critical question posed: Whether a student publications coordinator's speech on and about the First Amendment as it concerns those student publications is itself protected by the First Amendment, so that the student publications coordinator cannot be subjected to adverse treatment in retaliation for her exercise of those First Amendment rights.

The District Court's conclusion that Petitioner Cullen's expressions on the subject of the First Amendment were "not a matter of public concern" is inexplicable and clearly inconsistent with prevailing First Amendment jurisprudence.

It is well established that a state employee cannot be retaliated against for the exercise of the employee's rights protected under the First Amendment. *E.g., Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The question in this case is whether the Petitioner's speech was a matter of public concern. The Petitioner respectfully submits that her speech about the First Amendment cannot be considered anything other than a matter of public concern.

In *Pickering*, this Court determined that a teacher could not be dismissed in response to a letter to the newspaper criticizing actions of the superintendent and Board of Education, even though the teacher's statements may not have been accurate and the teacher's motivation may have involved his own concern with the amount of his own salary. *Id.*, 391 U.S. 572, 574; 20 L.Ed.2d 819, 821.

Similarly, this Court determined that a college professor's statements concerning whether the college should become a four year institution, a controversial subject opposed by the Regents of the college, was determined to be within the protection of the First Amendment. *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Even the private expression of concerns of a public employee to her supervisor is within the protection of the First Amendment. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). Even a statement expressing the hope of a presidential assassination is protected under the First Amendment, and a public employee cannot be fired for such expression. *Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987).

"Public interest is near its zenith when insuring that public organizations are being operated in accordance with the law." *Marohnic v. Walker*, 800 F.2d 613, 616 (6th Cir. 1986). "Speech by public employees is deemed to be speech about public concern when it relates to their employment so long as it is not speech upon matters of only personal interest." *Swineford v. Snyder County*, 15 F.3d 1258, 1271 (3rd Cir. 1994).

Here, the Petitioner's speech concerning the First Amendment rights applicable to student publications was a matter unquestionably of public concern, not a personal employment dispute. Cf. *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Indeed, there was no personal employment dispute until ***after*** the Petitioner's assertion of the First Amendment Rights.

Accordingly, the facts of this case are distinguishable from the facts in the seminal decision in *Connick v. Myers, supra*. There, the employee had already been subjected to an adverse employment action before she spoke out on matters of office policy. In this case, however, the Petitioner spoke and acted to defend the free speech and free press rights of the students/student publications first, and was subjected to retaliation for her efforts later.

This Court may also simply inquire as to what speech of the Petitioner was personal in nature. The Petitioner's claims only involve her stated concerns with the First Amendment rights applicable to the student publications; the Petitioner did not assert any matters of personal concern. Indeed, the Petitioner's own personal interests would have been best served by silence on the First Amendment issues.

While the Petitioner acknowledges that the rights of a public employee under the First Amendment are not absolute, nevertheless, in this case, the Respondents never offered any countervailing interests outweighing the Petitioner's First Amendment rights. Cp./cf. *Tinker v. Des Moines Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 733 (1969).

The United States Court of Appeals for the Sixth Circuit failed to accord the Petitioner the protection and remedies to which she was entitled consistent with the United States Constitution, laws, and the precedents of this Court. This Court should issue the Writ of Certiorari in order to clarify that speech about the First Amendment is itself protected under the First Amendment. Indeed,

there does not appear to be any type of speech worthy of any greater protection under the First Amendment.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Case No. 96-6116

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LAURA CULLEN,

Plaintiff-Appellant,

CHARLES KINCAID; CAPRI COFFER,

Intervening Plaintiffs-Appellants,

v.

BETTY GIBSON, individually, and in her official capacity as Vice president of Student Affairs of Kentucky State University; ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

(Filed Sep. 4, 1997)

Before: KEITH, SUHRHEINRICH, Circuit Judges; ROSEN, District Judge.*

PER CURIAM. The Plaintiff-Appellant, Laura Cullen ("Cullen") is appealing the order of the district court,

* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

which denied her motion for a preliminary injunction, and dismissed her First Amendment claims. We **AFFIRM** the district court's dismissal of Cullen's claims because the case is moot, and therefore, we do not have jurisdiction to hear this appeal.

Statement of the Case

This action was commenced by Cullen, who was the Coordinator of Student Publications at Kentucky State University, ("KSU"), seeking to prohibit the Defendants from confiscating the school yearbook, from attempting to control the content of the yearbook and newspaper, and for retaliating against her for advocating in favor of a union for non-academic employees. The Defendants to this action are various employees and Regents of KSU.

On March 14, 1995, Cullen filed her complaint. On June 1, 1995, she amended the complaint. Cullen's complaint and amended complaint alleged that she was punished and penalized for exercising constitutional rights protected by the First Amendment because she refused to direct the removal of content considered critical of the administration, and because of her position as bargaining agent for the union.

The district court awarded summary judgment in favor of the Defendants as to Cullen's allegations that she was punished and penalized because she championed the students' First Amendment rights. The court held that Cullen lacked standing to assert such a claim because she is not asserting her First Amendment rights, but rather those of the students. The district court did not dismiss

Cullen's claim alleging that she was penalized for advocating in favor of the union. Cullen, however, voluntarily dismissed those portions of her claim that survived the Defendants' motion for summary judgement so that she could appeal to this Court. On June 2, 1995, the district court also denied Cullen's motion for a preliminary injunction seeking a release of the yearbooks.

Statement of Facts

Cullen was employed by KSU in January of 1992, as Coordinator of Student Publications. From January of 1992 through July of 1994, Cullen's supervisor was defendant Betty Gibson. In July of 1994, Leslie Thomas became Cullen's supervisor. Thomas was in turn supervised by Gibson.

According to Cullen, in November of 1994, Gibson directed her not to print a particular letter to the editor and suggested that more positive news should be placed in the paper. Cullen refused, stating that such a request was inconsistent with the First Amendment. Cullen maintains that as a result, she was transferred from her position as Coordinator of Student Publications to an unspecified position in the Housing Office the following day. The Defendants maintain that Cullen was transferred for two reasons. First, there were many complaints about student publications, of which Cullen was the advisor. The district court found it undisputed that there were many complaints about the student publications office. Second, KSU needed another employee in the housing division because one of the employees had resigned. The district court also found this to be true. However, the

district court noted that KSU did not properly follow its own procedures for transferring employees when it transferred Cullen. Cullen was not provided with either notice or a hearing. The district court found that Cullen's compensation and status were not affected. Cullen worked in the housing division for approximately one month, after which she returned to her position as Coordinator of Student Publications.

On November 28, 1994, the same day that Cullen was transferred to the housing office, the 1992-94 yearbook was received from the publisher. Without consulting the Student Publications Board, Gibson and others determined that the yearbooks should not be distributed because of their poor quality. On the same day that Cullen resumed her position as Coordinator, December 20, 1994, Gibson wrote a memorandum indicating that the student newspaper would be reviewed by the Student Publications Board before going to print. On July 31, 1995, Cullen resigned from KSU.

Discussion

Cullen complained of three alleged constitutional violations. First, she complained that she was demoted because of her union activities, and because she spoke out in favor of the students. As a remedy, she sought merit raises, as well as compensatory and punitive damages. Second, she complained that the Defendants unconstitutionally exercised prior restraint over the content of student publications. As a remedy, she sought both temporary and permanent injunctions requiring the Defendants to cease and desist from any attempt to exercise

prior restraint over student publications. Third, she complained that the Defendants unconstitutionally prevented the distribution of the yearbook. As a remedy, she sought both temporary and permanent injunctions requiring the Defendants to distribute the yearbooks. The district court denied the Defendants' motion for summary judgment as to the first element of Cullen's complaint. Cullen later voluntarily dismissed that element in order to appeal the district court's order granting summary judgment as to the second and third elements of her complaint. It is those two elements of the complaint that are before us on appeal.

Cullen argues that the district court erroneously ruled that she does not have standing to challenge the alleged unconstitutional regulations imposed by the administration upon student publications at the University. She argues that she can show injury in fact and that a right personal to her has been violated. Moreover, she asserts that if injury in fact is shown, she can be found to have jus tertii standing to proceed based on the rights of a third party. The Defendants argue that Cullen's claim is moot and must be dismissed because Cullen voluntarily resigned from her position with KSU. They maintain that Cullen's standing to assert these claims and to ask for injunctive relief was based upon her position as Student Publications coordinator; because she resigned from that position, she does not have standing.

Mootness is a component of subject matter jurisdiction as rooted in the Constitution, which limits the jurisdiction of federal courts to "Cases" and "Controversies."

U.S. Const. art. III, § 2. When changes in a party's circumstance render a case moot, an Article III case or controversy no longer exists, and we are without jurisdiction to consider the merits of the appeal. *Honig v. Doe*, 484 U.S. 305, 317 (1988). A case is moot when no live controversy remains, and no live controversy remains when a court cannot provide effective relief. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193, 199 (1988).

We agree with the Defendants that Cullen's resignation from KSU renders this case moot, and therefore we are without jurisdiction to consider this appeal. The crux of Cullen's complaint is that KSU violated the First Amendment rights of the students through prior restraint and confiscation of the yearbook. Relatedly, she asserts that KSU also violated her First Amendment rights when she intervened on behalf of the students as Student Publications Coordinator.

Cullen's basis for complaining about KSU's alleged attempts to control the content of the student publications was the fact that she was Student Publications Coordinator. Having disassociated herself from KSU, that critical jurisdictional nexus no longer exists. Cullen cannot complain to this Court with respect to matters at KSU, when she is no longer associated with that institution. Because Cullen's case is moot, she lacks standing to petition this Court for relief.[1] *United States Parole Comm'n*

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[1] We note that the "capable of repetition yet evading review" exception is not applicable in this case as the two students who unsuccessfully moved to intervene in this lawsuit, are pursuing a currently pending lawsuit raising the same First Amendment issues in the District Court. Thus, the issues raised by Cullen are not going to evade review.

v. Geraghty, 445 U.S. 388, 397 (1980); *Washegesic v. Bloomingdale Public Schools,* 33 F.3d 679, 682 (6th Cir.1994). Thus, even assuming the truth of her allegations, we cannot provide her with the injunctive relief that she seeks. *Deakins v. Monaghan,* 484 U.S. 193, 199 (1988) (holding that an appeal is moot if the court cannot provide effective relief); *Charter Township of Huron v. Richards,* 997 F.2d 1168, 1175 (6th Cir.1993).

Conclusion

For the foregoing reasons we **AFFIRM** the district court's dismissal of this case.

APPENDIX B

Case No: 96-6116

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

(Filed Oct. 8, 1997)

LAURA CULLEN;

Plaintiff - Appellant

CHARLES KINCAID; CAPRI COFFER

Intervenors - Appellants

v.

BETTY GIBSON, individually, and in her official capacity as Vice President of student Affairs of Kentucky State University; MARY SMITH, individually, and in her official capacity as President of Kentucky State University; WILLIAM PARKER, Dr.; GEORGE H. HELTON; ROBERT E. ISON; VALINDA E. LIVINGSTON; VELERIA SHAVERS; RICHARD TAYLOR, Dr.; MICHELE C. COLEMAN; M. ANTHONY HOWARD; JOYCE ANN JOHNSON; ANTHONY T. REMSON, Dr.; CURTIS D. SULLIVAN, all individually and in their official capacity as Regents of Kentucky State University

Defendants - Appellees

THE STUDENT PRESS LAW CENTER

Amicus Curiae

BEFORE: KEITH and SUHRHEINRICH, Circuit Judges, and ROSEN, District Judge.*

Upon consideration of the petition for rehearing filed by the Appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

---

* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 95-21

LAURA CULLEN,

PLAINTIFF,

V. MEMORANDUM OPINION AND ORDER

BETTY GIBSON, et al., DEFENDANTS.

(Filed April 4, 1996)

* * *

This matter is before the Court upon the motion of the defendants for summary judgment. [Record No. 64]. The plaintiff Laura Cullen has filed a response [Record No. 66] to which the defendants have replied [Record No. 67].

Being fully briefed, this matter is ripe for consideration.

FACTUAL BACKGROUND

This action brought pursuant to 42 U.S.C. § 1983 arises out of Laura Cullen's (Cullen) employment with Kentucky State University (KSU) in late 1994. Cullen claims violations of both the First and Fourteenth Amendments as well as pendent state claims alleging violations of sections 1, 2, and 8 of the Kentucky Constitution.

In late 1994 Cullen was employed as the Student Publications Coordinator with KSU. From January of 1992

to July of 1994, Cullen's supervisor had been Betty Gibson (Gibson) Vice President of Student Affairs. Due to a restructuring in July of 1994, Cullen came under the supervision of Leslie Thomas (Thomas), Director of Student Life.[1] On November 28, 1994, Cullen was relieved by Gibson of the duties of this position and assigned to "temporary duty" in the Office of Housing. Cullen claims that this reassignment constituted a "transfer" within the meaning of KSU's employee policies and procedures[2] and that this transfer was based on (1) her support of unionization; and (2) her position and or actions with respect to the student newspaper and student yearbook. Cullen contends that she sent a memo to Gibson on November 29, 1993, stating her support for the union. Gibson then attached a copy of the memo to a letter to President Mary Smith and further indicated that she herself opposed the union.

Gibson gives very different reasons for this temporary reassignment. First, Gibson maintains that a significant number of complaints had been lodged regarding the student publications for which Cullen was responsible and that she needed time to step back and analyze the

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[1] Cullen opposed this restructuring plan due at least in part to her contention that it would lessen the autonomy of the Student Publications Office. As best the Court can understand Cullen's claims, she is not claiming that her position on the restructuring resulted in retaliation against her.

[2] The transfer or reassignment was a summary decision taken without notice or hearing. Provided this action can be considered a "transfer" within the meaning of KSU policy, certain procedures are required which apparently were not followed here.

situation. These complaints included excessive grammatical errors, poor quality of photographs, and unfair treatment of faculty and staff. Second, Gibson claims Cullen was needed because the Office of Housing was shorthanded.

Regardless of the reasons for the temporary reassignment, Cullen's compensation and status were not effected. However, there has been testimony that Gibson directed Thomas to have the locks on the office changed (but decided otherwise upon learning from Thomas that Cullen had turned in her keys), discussed two potential replacements for Cullen, and told Thomas that Cullen was on probation and could not receive a raise. [Thomas Deposition, p. 47, 25, and 16].

On December 20, 1994, Cullen resumed her position as Coordinator of Student Publications. On this same date, Gibson wrote a memorandum indicating that the student newspaper would be reviewed by the Student Publications Board before going to print. According to Cullen, Gibson continued to attempt to control the content of the student publication.

On the same date that Gibson was assigned to temporary duty with the Housing Office, the 1992-94 yearbook was received from the publisher. Without consulting the Student Publications Board, Gibson and others determined that the yearbooks should not be distributed because of their poor quality.

Effective July 21, 1995, Cullen tendered her resignation.

DISCUSSION

In order to state a prima facie case of unconstitutional political retaliation under the First Amendment, Cullen must show that (1) she engaged in activities which were constitutionally protected; and (2) the exercise of those rights was a substantial motivating factor in the decision to take adverse employment action. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 284-87 (1977); *Adkins v. Bd. of Educ. of Magoffin County*, 982 F.2d 952, 957 (6th Cir. 1993). Upon the plaintiff satisfying this burden, the defendants may rebut with evidence that the same actions would have been taken regardless of the protected activity. *Mt. Healthy*, 429 U.S. at 287.

The defendants have offered no argument with respect to Cullen's Fourteenth Amendment claim. As a consequence, this Memorandum Opinion and Order is limited to a discussion of Cullen's First Amendment claims.

A. Adverse Employment Action

There seems to be an initial question as to whether Cullen in fact has been subjected to some sort of adverse employment action. As recited above, it is clear that within a brief period of time Cullen was reassigned to her former position as Student Publications Coordinator and never suffered any set back in terms of pay. *See Yates v. AVCO Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (addressing the concept of adverse employment action under Title VII). However, the employment actions taken need not reach the level of discharge in order to constitute an

adverse employment action. A transfer or other penalization may suffice under the appropriate circumstances. *Boger v. Wayne County*, 950 F.2d 316, 322 (6th Cir. 1991) (holding that the plaintiff "need not have suffered loss of salary, promotional opportunities, seniority or other monetary deprivations"); *Reichert v. Draud*, 701 F.2d 1168 (6th Cir. 1983).

An adverse employment action has been alleged. Although Cullen's compensation was not effected, her reassignment even temporarily left her feeling humiliated and censured. Gibson considered Cullen to be on probation status and ineligible for any raises and notified Thomas of this. As a result, although there may have been no direct economic loss the actions taken here rise to the level of an adverse employment action, whether or not those actions constitute unconstitutional discrimination.

B. Constitutionally Protected Activities

As indicated above, in order for Cullen to make out a prima facie case she must first establish that her political beliefs and statements regarding the union are constitutionally protected activity. The defendants maintain that Cullen's activities cannot be considered speech on a matter of public concern as set forth in *Connick v. Myers*, 461 U.S. 138 (1982), and thus must yield to the interest in promoting efficiency in the office.

The Court disagrees with the defendants' characterization of Cullen's speech. In *Connick*, the plaintiff circulated a questionnaire in which all of the questions except

one concerned matters which could be fairly characterized as not of public import. Essentially, these questions reflected the plaintiff's dissatisfaction with her job transfer and an effort to turn her cause into a cause celebre in the office. One question, however, was held to be of public concern. That question asked coworkers whether they felt pressured to work on political campaigns for those candidates that the office supported.

Cullen's statements and position concerning establishing a union at KSU more closely resemble the question touching upon matters of public concern than the questions deemed to deal with matters of personal interest. A determination of whether the activity is of public concern is a question of law and must be determined by the "content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 148, 148n.7. Clearly, comments on unionization of the staff at KSU would reach beyond the narrow confines of Cullen's own office and effect the staff and indeed the campus as a whole. It is beyond cavil that Cullen's statements and position touched upon matters of public concern.

As a result, Cullen's statements and position constitute protected activity implicating the so called *Pickering* balancing whereby a balance is struck between "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick*, 461 U.S. at 142.

C. Substantial Motivating Factor

The defendants argue that Cullen is unable to show that the exercise of her constitutionally protected rights was a substantial motivating factor in the decision to temporarily reassign Cullen. According to Gibson, she does not now recall Cullen's position on the Union question. Cullen did not speak out in favor of the union at the Board of Regents meeting where the union question was discussed. In addition, the office to which she was temporarily assigned had just lost an employee, Danita Patterson.

In opposition, Cullen maintains that Gibson was against the union and that Gibson was aware of Cullen's support for the union. According to Cullen, she sent a memorandum dated November 29, 1993, to Gibson stating her support of the union. This memorandum was then forwarded to President Mary Smith along with a letter from Gibson indicating her own opposition to the union.

Even where a plaintiff has satisfactorily alleged substantial motivating factor, the defendant is entitled to point to other legitimate reasons supporting the action taken. Here, it is apparent that the Housing Office was short one employee. It is also clear that a number of complaints had been lodged regarding the quality of the student newspaper and yearbook. At this stage in the proceedings, the Court is not satisfied that this rebuttal evidence entitles the defendants to summary judgment. Cullen's temporary reassignment could be viewed as a drastic measure to take to deal with complaints concerning grammatical errors and general inexperience and

ineptitude in the student publication. Further, despite these cited complaints Cullen was then reassigned to her position as Student Publications Coordinator. Suffice it to say that there is sufficient disagreement to require submission to a jury.

In light of the foregoing, the Court does not find the evidence to be so one sided as to support summary judgment for the defendants on this point. Where a party seeks summary judgment on a state of mind issue, granting summary judgment usually is not appropriate unless the non-moving party "rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Picha v. City of Parma,* 1992 WL 57419 * 2 (6th Cir. 1992) (citing *Medina-Munoz v. R.J. Reynolds Tobacco Co.,* 896 F.2d 5, 8 (1st Cir. 1990)). A plaintiff must ordinarily rely on circumstantial evidence and reasonable inferences from the defendant's conduct to show the state of mind. *Id.*

D. Cullen's and the Students' First Amendment Rights

Part of Cullen's complaint deals with the decision to not distribute the 1992-94 yearbooks which had been received from the publisher.[3] Closely related to this claim is Cullen's general claim of having been retaliated against

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[3] The defendants claim that the yearbook was withheld after an administrative decision based on the poor quality of the yearbook.

on the basis of championing the First amendment rights of the students with respect to the student newspaper.[4]

As previously suggested, the Court does not believe that Cullen is in a position to assert the First Amendment rights of the students. The problem is akin to a standing question. Cullen served as the Student Publications Coordinator and as such it was not her own speech but rather that of the students that was published. It is axiomatic that a cause of action pursuant to 42 U.S.C. § 1983 requires that the plaintiff establish that (1) **he** himself was deprived of a right secured by the federal Constitution or laws of the United States; and (2) the deprivation was caused by a person acting under color of state law. *Parratt v. Taylor,* 451 U.S. 527, 535 (1981); *O'Brien v. City of Grand Rapids,* 23 F.3d 990 (6th Cir. 1994).

The standing problem is equally applicable to Cullen's claim of prior restraint. However, an additional problem also exits [sic]. It is apparent that, although Gibson indicated that the student newspaper would be submitted for review prior to publication, such prior submission never took place. At best then this alleged

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[4] In so far as Cullen is claiming that her statements and position on the First Amendment was a substantial motivating factor in the adverse employment decision, the same analysis discussed with respect to the union theory would obtain. As the Court understands it, this was Cullen's claim with respect to the letter submitted to the student newspaper. She claims that Gibson opposed publishing the letter and at one time seemed to suggest that her position resulted in retaliation by Gibson. Eventually she concedes that the letter incident had nothing to do with her reassignment. [Cullen's Deposition, p. 107].

prior restraint was a threatened policy never implemented. To have a prior restraint, there must be some [sic] "some suppression, prohibition, inhibition, hinderance or constraint of speech. . . . " *Information Provider's Coalition v. F.C.C.*, 928 F.2d 866, 876-78 (9th Cir. 1991). Given the particularized assessment under the circumstances which is necessary in prior restraint cases, the prior restraint claim here is simply too amorphous for any meaningful review. *Information Provider's*, 928 F.2d at 877 (citing *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441-42 (1957)).

Accordingly, in so far as Cullen's First Amendment claim asserts a violation of the **student's** First Amendment rights with respect to the student newspaper and yearbook, this claim must be dismissed.

CONCLUSION

The Court concludes that the temporary reassignment of Cullen constitutes an adverse employment action within the meaning of *Mt. Healthy*. Cullen's claim that this action was taken as a result of her statements and position on the question of a union at KSU survives this motion for summary judgment. Cullen's claim that the withholding of the 1992-94 yearbooks and the prior review policy outlined in Gibson's letter for the newspaper violated her own First Amendment rights fails because these rights are not hers but rather the students.

Finally, the Court notes that dismissal of the pendent state claims would be inappropriate in light of the disposition on the federal claims.

Accordingly,

IT IS HEREBY ORDERED:

(1) That the motion of the defendants for summary judgment [Record No. 64] be, and the same hereby is, **GRANTED IN PART AND DENIED IN PART;**

(2) That only in so far as Cullen's First Amendment claim asserts a violation of the student's First Amendment rights with respect to the student newspaper and yearbook, this claim shall be, and the same hereby is, **DISMISSED.**

(3) That the motion of the defendants to continue the pretrial conference and trial [Record No. 68] be, and the same hereby is, **DENIED**.

This the 4th day of April, 1996.

/s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
April 4, 1996

Case Number: 3:95-cv-00021

D. Bruce Orwin

Winter R. Huff

William E. Johnson

J. Guthrie True

Certificate of Mailing by CBD.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 95-21

LAURA CULLEN,

V. **ORDER**

BETTY GIBSON,
et al., DEFENDANTS.

(Filed May 7, 1996)

* * *

Before the Court is a motion by the plaintiff Laura Cullen (Cullen) to alter or amend. [Record No. 77]. Such motion is construed to be a motion for clarification. The defendants have filed a response. [Record No. 83].

On April 4, 1996, the Court granted in part and denied in part a motion by the defendants for summary judgment. [Record No. 69]. That Memorandum Opinion and Order held that Cullen's claim of a violation of her First Amendment rights with respect to her statements and position concerning a union at Kentucky State University survived. Cullen's claim based on the withholding of the yearbooks and the prior review policy outlined in Betty Gibson's letter were dismissed.

Confusion exists over Cullen's First Amendment claim based **not** on the students' First Amendment rights but rather on **her own** statements and position pertinent to the students' rights. Indeed, to date the parties have not clearly defined whether Cullen is in fact making this claim. Assuming that she was, the Court held that the same analysis used for the union theory would apply.

[Record No. 69, p.9 n.4]. Even so, the only evidence which has come to the attention of the Court concerns the letter incident which is, by Cullen's own admission, insufficient to support this theory.

In so far as Cullen predicates her First Amendment claim on her own statements and position concerning the students' First Amendment rights and has evidence other than the letter incident upon which to base that claim, such claim is subject to the same analysis as the union theory claim. That is, it must be determined whether the speech is on a matter of public concern. *Connick v. Meyers*, 461 U.S. 138 (1982). Under these circumstances, Cullen's concern over the students' publications is not a matter of public concern but rather relates to matters of internal quality and, therefore, to the extent Cullen advances such claim it must be dismissed. Cullen cannot bootstrap with the students' First Amendment rights in this manner.

IT IS ORDERED that the construed motion of the plaintiff for clarification [Record No. 77] be, and the same hereby is, **GRANTED** in light of the foregoing explanation.

This the 7th day of May, 1996.

/s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
May 7, 1996

Case Number: 3:95-cv-00021

D. Bruce Orwin
Winter R. Huff
William E. Johnson
J. Guthrie True

Certificate of Mailing by CBD.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION
CIVIL ACTION 95-21

LAURA CULLEN

VS. *ORDER*

BETTY GIBSON,
et al, DEFENDANTS

(Filed Jul. 19, 1996)

* * *

This matter having come before the Court upon the Motion of the Plaintiff pursuant to CR 41(a)(2) to voluntarily dismiss that portion of the Plaintiff's Complaint wherein she alleged retaliation in violation of her protected rights under the Constitution of the United States for her efforts to organize a union of certain employees at Kentucky State University,

IT IS HEREBY ORDERED that this cause of action be hereby dismissed without prejudice pursuant to Fed.R.Civ.P. 41.

The Plaintiff having further moved the Court to make all prior orders of the Court dismissing certain causes of action and claims of the Plaintiff final,

IT IS HEREBY FURTHER ORDERED that the prior orders of the Court dismissing certain claims of the Plaintiff are hereby final and appealable.

Done under my hand as Judge of the United States District Court for the Eastern District of Kentucky on this the 14th day of July, 1996.

/s/ Joseph M. Hood
JUDGE, UNITED STATES
DISTRICT COURT

APPENDIX E

Class Code 9486
Grade 9
September 11, 1987

JOB DESCRIPTION

Job Title: Coordinator (I) of Student Publications

Department: Student Affairs

Job Relationships:

Supervised By: Vice President for Student Affairs

Supervises Student workers

Position Summary: Exempt

Duties and Responsibilities:

1. Handle day-to-day operations of the student newspaper including supervising student workers and making assignments.

2. Cover campus events; handles all typesetting for the newspaper, both copies and ads; does extensive darkroom work, including developing film, making prints and shooting PMT half-tones; does lay-out and design; is responsible for delivery of camera ready pages to printer; handles pick-up, on and off-campus distribution; solicits advertising, makes advertising contracts with both local and national media outlets; handles advertising billing; maintains account; orders and maintains supplies. Student assistance is utilized for some of these duties but the bulk of the responsibility will often fall on the advisor/director.

3. Serves as an advisor to the campus yearbook. Duties include lay-out and design; writing copy; taking, developing and printing photos; arranging

for photo sessions; dealing with printer and company representative; and supervising student workers and making assignments.

4. Other duties, projects and responsibilities as assigned by the Vice President for Student Affairs.

Qualifications:

Minimum of a bachelor's degree in Journalism or related field. Thorough knowledge of all areas of newspaper publication and production including typesetting, reporting, darkroom and photography skills.

Knowledge, Skills and Abilities:

Ability to produce a quality product on a regular basis.

Ability to deal with students, faculty, staff, and news sources.

Typesetting experience on Compugraphic system.

Darkroom and photography skills.

Reporting and editing skills.

Lay-out and design skills.

Knowledge of advertising principles.

APPENDIX F

Student Publications

The Board of Regents respects the integrity of student publications and the press, and the rights to exist in an atmosphere of free and responsible discussion and of intellectual exploration. The Board expects student editors and faculty advisors to adhere to high standards of journalistic ethics and the highest level of good taste and maturity in the integrity, tone and content of student publications.

Student Publications Board

The Thorobred News (Student Newspaper) and the Thorobred yearbook shall be under the management of the Student Publications Board. Though both publications are subsidized by the University, it is the intent that both shall be as free of censorship as prevailing law dictates.

The Student Publications Board membership shall consist of two members of the faculty, one of whom shall serve as chairperson; the editor of the Thorobred News, the editor of the Thorobred Yearbook, two student staff members (other than the editors of the yearbook and the newspaper), and the following exofficio members – Vice President for Student Affairs, Director of Student Life, President of Student Government Association, and the Student Publications Advisor. Except for those who are exofficio, all members and the chairperson are appointed by the President of the University for a term of one (1) year. Appointments are made during the spring semester for the succeeding year.

The Student Publications Board shall:

1. Approve the written publications policy of each student publication, including such items as purpose, size, quantity controls, and time, place and manner of distribution;
2. Set qualifications for and (upon nomination by the Student Publications Advisor), appoint the editor of each publication who shall serve for a one-year term, unless reappointed or removed by the Board for cause;
3. Set qualifications for and appoint staff members for each publication upon nomination of its editor with concurrence of the Student Publications Advisor, also, remove any of these staff members for cause;
4. Arrange seminars for student publications personnel with skilled publications experts for discussion of reporting, editing, and other journalistic techniques;
5. Provide the Thorobred News and Thorobred yearbook staffs with counsel, and encourage them to maintain for fiscal, news and editorial responsibilities.

In subsidizing the Thorobred News through the Student Publications Board, the University expects the newspaper to maintain at least these two standards of quality control:

1. Report accurately and fairly newsworthy campus events; and
2. Pursue important news events to make sure they are reported and commented upon on the editorial pages with comprehension and full understanding of the facts.

Since the Thorobred News is not an "official" organ of the University, the Student Publication Board shall cause to be inserted in the masthead a standing and distinct disclaimer indicating that the views expressed are not necessarily those of the University, but rather are those of the named student author, editor or board of editors. In setting qualifications for the editors of the newspaper and yearbook, the Board shall include a sufficiently high academic average or the successful completion of a basic journalism course, or both. To assure that the newspaper and yearbook is not overwhelmed by ineptitude and inexperience, the Board shall require the use of an experienced advisor. In order to meet responsible standards of journalism, an advisor may require changes in the form of materials submitted by students, but such changes must deal only with the form or the time and manner of expressions rather than alteration of its content.

It is the responsibility of the editor to verify the accuracy of all printed matter, and to recognize that he/she will be subject to the legal exigencies that may arise from improper reporting of news.

APPENDIX G

OFFICE OF STUDENT AFFAIRS

MEMORANDUM

TO: Miss Laura Cullen

FROM: /s/ Betty M. Gibson
(Mrs.) Betty M. Gibson
Vice President for Student Affairs

RE: Job Assignment

DATE: December 20, 1994

Prior to returning to your position as Coordinator of Student Publications, I find it necessary to give you specific expectations of your job performance.

1. The student newspaper error rate must be reduced;
2. More positive news is to be published;
3. There must be coverage of all campus events – athletics, cultural, social and academic;
4. The quality of photographs published must be improved;
5. The paper must be reviewed by *The Student Publications Board* before going to print.
6. Must meet all deadlines for yearbook and monitor clearly the content;
7. Device ways to recruit staff for newspaper and yearbook and to submit to Mrs. Leslie Thomas by January 31, 1995.
8. Must select student of the month for January, February, March, April and May, and cover all procedures associated with this task.

9. Must work within the approved budget for the 1994-95 fiscal year;

10. A hearing for Harold Holt must be held before January 31, 1995.

Your job performance will be reassessed in sixty (60) days.

BMG:fgl

cc: Personnel
Mrs. Leslie Thomas